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Supreme Court, U.S.
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No. 92-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DIVERSIFIED FOODS, INC., *and*
NEW ENGLAND SALES, INC.,

Petitioners,

v.

THE FIRST NATIONAL
BANK OF BOSTON, *and*
CASCO NORTHERN BANK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts have exclusive jurisdiction over the anti-tying and exclusive dealing provisions of the Bank Holding Company Act, Title 12, Section 1972 of the United States Code.

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v.

THE FIRST NATIONAL
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CASCO NORTHERN BANK,

Respondents.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 985 F.2d 27 (1st Cir. 1993). An earlier opinion of the United States District Court for the District of Maine is reported at 785 F. Supp. 8 (D. Me. 1992).

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was issued on February 5, 1993. This Court's jurisdiction rests on 28 U.S.C. § 1254.

STATUTE INVOLVED

Title 12, Section 1975 of the United States Code provides, in relevant part:

> Any person who is injured in his business or property by reason of anything forbidden in Section 1972 of this Title may sue therefor in any district of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of the suit, including a reasonable attorney's fee.

Title 12, Section 1972 of the United States Code provides:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement --
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
> >
> > (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, or such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this section.

STATEMENT OF THE CASE

Federal court jurisdiction in this case was based on the federal questions raised in all counts of the Complaint. *This petition* for a writ of certiorari arises from an order of the First Circuit Court of Appeals affirming a district court order granting Respondents' motion for summary judgment on all counts of a three-count complaint asserting three claims of federal antitrust violations. The basis for the order was that state courts have concurrent jurisdiction over the antitrust claims involved in this case and that therefore these claims should have been asserted along with state law claims in a related state court proceeding.

The motion for summary judgment should have been denied since (a) jurisdiction over the federal antitrust claims is vested exclusively in the federal courts; and (b) Respondents acquiesced in permitting the claims to be pursued separately and, in fact, opposed repeated attempts initiated by Petitioners to have both cases consolidated for disposition in a single court.

The state court litigation began in the summer of 1989; the federal action began in September 1990; summary judgment was entered in the state court on April 18, 1991, and in the federal court on January 8, 1992.

The state court lawsuit was filed by Diversified Foods, Inc. ("DFI"), New England Sales, Inc. ("NES") and Ronald C. Giguere (a principal stockholder of DFI) against the First National Bank of Boston and Casco Northern Bank, N.A. ("the banks"), asserting various state law tort and contract claims arising out of wrongs committed by the banks in September 1988 during the course of a lending arrangement between DFI, NES and the banks ("the lender liability action"). The banks asserted claims to collect on notes and security as a counterclaim to that suit.

In the course of discovery in the state court action, Petitioners discovered internal documents of the banks disclosing that

they had engaged in anti-competitive practices designed to preclude DFI and NES from obtaining additional or alternative financing from a competing bank.

On June 29, 1990, in a conference with the state court Justice assigned to handle the state case, counsel for Petitioners advised the court and opposing counsel that DFI and NES intended to file an action in the U.S. District Court contending that the banks had violated the anti-tying and exclusive dealing provisions of the Bank Holding Company Act, 12 U.S.C. § 1972. Counsel explained to the court that the facts supporting that claim had only recently been discovered and that a separate action was necessary because federal courts have exclusive jurisdiction over antitrust litigation.

On August 31, 1990, Petitioners moved to amend their state court complaint in relation to their count for breach of good faith and fair dealing. One of the proposed amendments asserted that the good faith obligations were violated by imposing certain "illegal" and "anti-competitive restrictions" which prevented Petitioners from obtaining alternative financing.

On September 14, 1990, Petitioners filed the present action against the banks in the U.S. District Court asserting claims based exclusively on the provision of 12 U.S.C. § 1972.

On September 25, 1990, the banks filed their objection to Petitioners' motion to amend the state case, arguing that Petitioners could not claim anti-competitive conduct as an aspect of the good-faith breach because those issues would effectively bring into the state court proceedings the Bank Holding Company Act claims which were pending in federal court. Respondents argued that such issues would represent a drastic reversal of the thrust of the state case and indicated that those issues could be resolved in the U.S. District Court since "by Petitioners' admission" those issues are "involved in the federal case."

On September 28, 1990, at a hearing in the state court on the motion to amend, there were further indications that the banks desired to have the Bank Holding Company Act claims dealt with separately in federal court. After hearing further argument from the banks' counsel against allowing aspects of the federal claim to be heard in state court and obtaining Petitioners' concession that they would not bring any aspect of the federal claim into state court, the state court ordered the amendments to be allowed, but deleted the word "anti-competitive," and stated that "allegations of illegality under the federal act are no part of this trial." Later in his ruling, suggesting acknowledgment that the alleged antitrust violations could be pursued in the federal court, the state court justice remarked: "the illegality has become part of the federal action." *See* p. 17a, *infra*. Nothing was said by the banks suggesting that Petitioners had engaged in improper claim splitting by having filed the federal suit, nor was there even an indication by the banks that they reserved the rights to assert any defenses in that regard.

Approximately one month later, on October 24, 1990, the banks answered the federal complaint, asserting among numerous affirmative defenses that Petitioners had improperly split their claims. This defense was never pursued by motion for a stay nor referred to in any pleading or memorandum, in either the state or federal actions, until approximately six months later -- long after Petitioners had relied on several actions by the banks clearly suggesting acquiescence with the separate pursuit of the claims.

Rather than seeking consolidation of the federal action or dismissal due to claim splitting, within a few days after filing their answer to the federal complaint, the banks began conducting extensive discovery in the federal action. In early December 1990, counsel for the banks obtained an agreement from Petitioner's counsel that both parties would be permitted to use in the federal case all of the prior discovery conducted in the state court proceedings and that any future discovery would be treated as having been conducted in either the state or federal proceedings.

Also in December 1990, counsel for DFI and NES offered to consolidate the cases for a single disposition in the federal court, where jurisdiction unquestionably existed. The banks, after purporting to consider the offer, refused to agree.

Immediately after the banks' rejection, Petitioners attempted to achieve consolidation by filing appropriate motions in both the state and federal courts. On January 31, 1991, Petitioners filed in the federal court a motion to amend their federal complaint so as to add all of the state law claims. Petitioners also moved in the state court for a stay of the state court proceedings, contending that it would be more appropriate to have the federal court resolve the state and federal issues in a single proceeding. Petitioners explained that they were seeking to consolidate the state and federal cases since

> "The federal counts could not be joined to the state court action due to the exclusive jurisdiction of the federal courts. *See* 12 U.S.C. § 1975. Petitioners intend to seek a stay of the state court proceedings so that all issues can be tried at the same time in this action."

The motion further made it clear that Petitioners were seeking to avoid problems resulting from multiple litigation, rather than to get two bites at the apple, stating:

> "It is in the interest of justice and the promotion of judicial economy to have all of these claims tried at once. Absent an amendment the parties will have to basically try the case twice -- thereby consuming extensive time and resources of the parties counsel, the court, juries, witnesses and experts."

The state court did not stay that action, but proceeded to enter summary judgment on all state law claims on April 18, 1991. The banks then pressed their claim-splitting defense, arguing for the first time that jurisdiction over the antitrust claims was concurrent

and that they should have been brought in the state case. However, they continued to oppose adding the claims to the state case.

After blocking another amendment attempt in state court, Respondents sought and obtained judgment in federal court based on the claim-splitting defense. Although they twice blocked the federal claims from being raised in state court, they prevailed in arguing that the federal claims could be brought, and should have been brought, in state court.

ARGUMENT

Petitioners' Claim Under 12 U.S.C. § 1972 Could Not Have Been Brought In State Court Because Federal Courts Have Exclusive Jurisdiction Over Anti-Tying Violations.

There is a rebuttable presumption that state courts have concurrent jurisdiction over federal claims. *See Gulf Offshore Oil Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). This presumption can be rebutted, by, among other things, "a clear incompatibility" between state court enforcement and the federal interests involved or by an "unmistakable implication from legislative history."[1] *Id.* at 478.

This Court has repeatedly held over the past seventy-five years that enforcement of statutes nearly identical to the antitrust features, section 106, of the Bank Holding Company Act (12 U.S.C. § 1972) must be exclusively within the federal courts. State court enforcement has been considered an insufficient protection of the strong public interest in antitrust enforcement. Thus both incompatibility and legislative history compel a finding of exclusive federal court jurisdiction.

On several occasions since the earliest decision on the issue in 1920, this Court has held that jurisdiction over private controversies involving federal antitrust statutes lies exclusively within the federal courts. *See Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920) (Sherman Antitrust Act); *General Investment Co. v. Lake Shore &*

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[1]Justices Scalia and Kennedy have suggested that the implication must be in the text of the statute and that incompatibility alone will not suffice, but must be joined with a statute which "expressly mentions only federal courts." *Tafflin v. Levitt*, 493 U.S. 455, 469-73 (1990). The statute involved in the present case only mentions federal courts.

Michigan Southern Railway Co., 260 U.S. 261, 286-87 (1922) (Sherman Act and Clayton Act); *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n.6 (1943) (Clayton Act, § 4 claim may be brought only in a district court; "[I]t is clear the Massachusetts state courts did not have jurisdiction."); *Hathorn v. Lovorn*, 457 U.S. 255, 267, n.18 (1982) ("[S]tate courts lack jurisdiction to entertain suits brought pursuant to § 4 of the Clayton Act."). These decisions are principally premised on an inference of Congressional intent from the jurisdictional grant that provides that these claims *may be brought* "in any district court of the United States." *Id.* Such a reasonable construction of these statutory grants is consistent with Congress' explicit rejection of attempts to create concurrent jurisdiction over antitrust matters.[2]

More recent decisions have explained the rationale for exclusive federal court jurisdiction as also being premised on the strong federal interest in antitrust legislation and the belief that such important legislation is more likely to be uniformly and properly enforced if handled solely in the federal courts. Antitrust legislation has been recognized as "a charter of freedom" comparable to a constitutional provision. *See Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360 (1933). This Court has stated that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise [and] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco*

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[2]*See* 51 *Cong. Rec.* at 9662-64 (1914) (Congress rejects amendment that would have given state courts concurrent jurisdiction over antitrust matters). *See also* M. Redish & J. Muench, "Adjudication of Federal Causes of Action in State Court," 76 *Michigan Law Review* 311, 318 (1976) (amendment to vest concurrent state court jurisdiction over Clayton Act violations "rejected because Congress intended that jurisdiction be exclusive in the federal courts").

Associates, Inc., 405 U.S. 596, 610 (1972). Special enforcement provisions were enacted in order to promote this strong national interest.[3]

Exclusive federal court jurisdiction over Clayton Act claims is premised on the belief that such issues were considered "too important to be decided otherwise than by competent tribunals." *University Life Insurance Co. v. Unimarc Ltd.*, 699 F.2d 846 (7th Cir. 1983). In the parlance of the *Gulf Offshore* decision, the Clayton Act had to be enforced solely in federal courts due to "the desirability of uniform interpretation, the expertise of federal judges in federal law and the assumed greater hospitality of federal courts to peculiarly federal claims." *Gulf Offshore Oil Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483-84 (1981).

This Court has continued through the present decade to recognize the national significance of antitrust laws, indicating in 1990 that such domestic suits are of sufficient national interest that they cannot be arbitrated. *See Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 655 (1990), ("root of the doctrine is in the same soil as the principle, announced in

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[3]To ensure enforcement of the antitrust laws, Congress authorized private civil actions with the plaintiff entitled to treble damages and counsel fees if he prevailed. 15 U.S.C. § 15. As the Court of Appeals for the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (1968) pointed out:

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy. Thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest."

Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440-41 (1920), that federal antitrust suits may not be brought in state courts.") In 1990 Justice White explained the rationale for exclusive jurisdiction as a concern that an improper interpretation by state courts "of the federal antitrust laws ... could have a disastrous effect on interstate commerce, a particular concern of the federal government." *Tafflin v. Levitt*, 493 U.S. 455, 468-69 (1990) (White, J., concurring).

The claims in this case arise out of a modified version of the Clayton Act, 15 U.S.C. § 15(a). The Clayton Act is, in fact, merely a generalized version of the identical anti-tying legislation. 12 U.S.C. § 1972 has been described as the "banking equivalent of § 3 of the Clayton Act, 15 U.S.C. § 14." *See Exchange National Bank of Chicago v. Daniels*, 768 F.2d 140 (7th Cir. 1985) ("[§ 1972] is similar to other anti-tying laws meant to preserve competition among rival businesses").

Section 106 of the BHCA was enacted in 1970 with various amendments to the BHCA. The 1970 amendments to the BHCA were enacted to address the threat to competition within the national economy posed by the sudden growth in the 1960's in the number and size of one-bank holding companies. *See generally* "Banks and Bank Holding Companies: A Panel Discussion," 39 *ABA Antitrust Bulletin* 432, 449-452 (1969-70) (remarks of Governor Maisel of the Federal Reserve Board). It was feared that banking conglomerates would unfairly use their substantial leverage associated with their credit-extending power. *See* A. Austin & E. Solomon, "Vertical Integration in Correspondent Banking," 122 *University of Pennsylvania Law Review* 366, 389-90 (1973). Congress was seriously concerned that the entry of banks and bank holding companies into other areas of business would "lead to the formation of a relatively small number of power centers dominating the American economy." S. Rep. No. 1084, 91st Cong., 2d Sess. 17, *reprinted in* 1970 *U.S. Code Cong. & Admin. News* 5519, 5535, 5557. The greatest concern of Congress was tying and exclusive dealing

problems in the national banking industry that were not being sufficiently deterred by the Clayton Act.[4]

The *per se* prohibition against tie-ins and exclusive dealing arrangements enacted in § 1972 was the centerpiece of the 1970 amendments to the BHCA and was "very hotly debated when it was before the Senate."[5] Those debates make it very clear that Congress understood that § 1972 of the BHCA had its genesis in

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[4]*See also generally* R. Clark, "The Regulation of Financial Holding Companies," 92 *Harvard Law Review* 787, 827 & 827 n.168 (1979) ("Throughout the hearings, almost every witness who supported the bill noted the significance of the tie-in problem, and almost every opponent was questioned as to his knowledge of that significance" (citing to legislative record)). *See also generally* "Recent Developments: The Antitrust Laws and One-Bank Holding Companies," 18 *Catholic University Law Review* 524 (1969):

> Banks are the major and in some cases the only source of credit in our economy. The danger of manipulation of this credit system to fulfill the desires of a bank to expand its activities can only have the adverse effects upon the nation's competitive economy.

Id. at 526-27. The "foremost" antitrust danger "is the so-called "tie-in" arrangement. *Id.* at 530 (footnote omitted).

[5]*See* "Banks and Bank Holding Companies: A Panel Discussion," *supra* at 438-445 (remarks of Donald I. Baker, Antitrust Division, Justice Department, concerning the "leverage question"); "Bank Holding Company Act -- The De Novo Doctrine, The Anti-Tie-In Provisions, and other Antitrust Implications: A Panel Discussion," 29 *The Business Lawyer* 237, 246 (Nov. 1972) (remarks of B. Tuttle, senior attorney, Board of Governors of the Federal Reserve Board).

the Sherman and Clayton antitrust acts. The Director of Policy Planning of the Antitrust Division of the Department of Justice, in proposing § 1972, stressed that it should be read "against its anti-tie-in history." *Id.* at 259. The Antitrust Division of the Justice Department participated in drafting § 1972 and advised Congress that § 1972 was antitrust legislation.[6]

In considering general antitrust law prior to the passage of the BHCA, Congress focused specifically on the question of how the general antitrust law should be amended to meet national concerns regarding competition in the field of commercial banking. *See, e.g.*, S. Rep. No. 1084, 91st Cong., 2d Sess. at 55, *reprinted in* 1970 *U.S. Code Cong. & Admin. News* at 5558.[7] *See also* E. Kinter & J Bauer, "Competition at the Teller's Window?: Altered Antitrust Standards for Banks and Other Financial Institutions," 35 *University of Kansas Law Review* 657,

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[6]The anti-tying provision was not considered by the Antitrust Division of the Justice Department as anything but anti-trust legislation. *Id.* at 258-59 (remarks of Donald I. Baker). The Justice Department supported the 1970 amendments to the BHCA in general, *id.* at 239 (remarks of Donald I. Baker), and § 1972, in particular, *id.* at 245 (remarks of Donald I. Baker) and participated in the drafting of the provision. *Id.* at 258-59 (remarks of Donald I. Baker). The contemporaneous interpretation by the Antitrust Division is entitled to great weight. *See NLRB v. United Food & Commercial Workers Union*, 484 U.S 112, 123 (1987); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108-120 (1980).

[7]Senator Brooke, quoting a letter from then Assistant Attorney General McLaren, wrote that the "proposed new section would go beyond the *Fortner* decision, which did not go so far as to hold tie-ins involving credit illegal per se." S. Rep. No. 1084, 91st Cong., 2d Sess. 17. *reprinted in* 1970 *U.S. Code Cong. & Admin. News* at 5558.

689 (1987) ("In light of . . . limitations of the general antitrust laws, Congress has on two occasions passed *specific* legislation to deal with conditional transactions by members of the banking industry . . . . " (emphasis added)).[8] Congress revised the general antitrust laws so that in the unique field of commercial banking, there would be "specific statutory assurance" that those unique powers could not be used to lessen competition or unfairly compete and so that a plaintiff would not be required to prove a specific anticompetitive effect or bank dominance or market control. *See* S. Rep. No. 1084 at 5558. *See also Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300, 306 (5th Cir 1990) (§ 1972 omits market power and anti-competitiveness elements and does not require customers to show coercion).

In construing the BHCA anti-tying provision, the circuit courts, recognizing that this statute is merely a particularized version of the Clayton Act, have unanimously incorporated principles from the general antitrust statutes and decisions.[9]

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[8]*See also, e.g.*, Legislative Note, "The Bank Holding Company Act Amendments of 1970," 39 *George Washington University Law Review* 1200 (1970) ("the problem of tie-in arrangements . . . became a significant area of concern during the debates over the Bank Holding Company Act Amendments of 1970 . . . . [and] there was a sharp division over the adequacy and ability of present antitrust law to meet this problem").

[9]*See Swerdloff v. Miami National Bank*, 584 F.2d 54, 58-59 (5th Cir. 1978) ("reference to antitrust statutes and decisions was 'most pertinent' in view of the substantial similarity of the Acts"); *Parsons Steel v. First Alabama Bank of Montgomery*, 679 F.2d 242, 245 (11th Cir. 1982) ("the purpose and effect of § 1972 is to apply the general principles of the Sherman Antitrust Act prohibiting anti-competitive tying arrangements specifically to the field of commercial banking"); *Campbell v. Wells Fargo Bank, N.A.*, 781

They have, in fact, observed that the national interest in regulating tying arrangements in the banking industry is greater than the interest in other aspects of the economy. *See Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300, 305 (5th Cir. 1990) (more important to prohibit conditional transactions in banking industry than in "less sensitive sectors of the economy").

Since many of the wrongs sanctioned in the BHCA provisions are necessarily prohibited by the Sherman and/or Clayton Acts,[10] it would be anomalous and contrary to basic

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F.2d 440, 443 (4th Cir. 1986) (citing *Parsons Steel* and quoting *Swerdloff*); *Duryea v. Third Northwestern National*, 606 F.2d 823, 825 (8th Cir. 1979) (intent of 1970 amendments "very similar to those of the antitrust laws in that both seek to guard against unfair competition" (citing *Swerdloff*); *Davis v. First Nat'l Bank of Westville*, 868 F.2d 206, 208 (7th Cir. 1989) ("tying ... reciprocity ... and exclusive dealing ... arrangements ... traditionally have been targets of the antitrust laws because of their potentially anti-competitive effects); *Palermo v. First Nat'l Bank and Trust Co.*, 894 F.2d 363 (10th Cir. 1990); *Exchange National Bank of Chicago v. Daniels*, 768 F.2d 140 (7th Cir. 1985).

Commentators have likewise analyzed the close connection between the BHCA and other antitrust statutes. *See, e.g.*, Note, "The Requirement of an 'Anticompetitive Effect' in the Anti-tying Provisions of the Bank Holding Company Act and Thrift Institutions Restructuring Act," 33 *Arizona Law Review* 199, 202-205 (1991) (BHCA vis-a-vis Sherman and Clayton Acts).

[10]*See Fortner Enterprises, Inc. v. United States Steel Co.*, 394 U.S. 495, 497-98 (1969) (credit extension tied to purchase of prefabricated homes from credit company's parent corporation and hence *per se* illegal). *See also, e.g.*, Note, "The Requirement of an Anticompetitive Effect," *supra*, at 203 ("Arguably, the Sherman Act

principles of statutory construction to allow state courts to construe § 1972 while prohibiting them from construing the virtually identical provisions of the Clayton Act.[11]

The anomaly is all the more extreme when one considers the fact that Congress enacted for the BHCA anti-tying provisions a jurisdictional grant virtually identical to that in the Clayton Act and very similar to that of the Sherman Act.[12]

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already prohibited banks from engaging in some tying arrangements with regard to extensions of credit.").

[11]It is a rudimentary principle of statutory construction to construe *in pari materia* statutes with a common origin. 2A N. Singer, *Sutherland Statutory Construction*, § 51.03 at 467 (4th ed. 1984). As *Sutherland* states:

> When a legislature enacts a provision, it has available all other provisions relating to the same subject matter whether in the same statute or in a separate act. Experience teaches that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency.

Id., § 51.01 at 450.

[12]The jurisdictional grant under the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . .

15 U.S.C. § 15.

In view of this nearly identical language and the genesis of the BHCA anti-tying provisions, it defies reason to believe that Congress intended *sub silentio* to make an exception to the deeply rooted doctrine requiring exclusive jurisdiction of antitrust legislation. Due to the long history of exclusive federal jurisdiction of a virtually identical subject matter, the nearly identical jurisdictional language of the BHCA must be construed in the same way as the Clayton Act jurisdictional provision. *See* 2A N. Singer, *Sutherland Statutory Construction* § 51.01 at 454 (4th ed. 1984) ("[u]nless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense.").

The jurisdictional grant in § 1972 of the BHCA appears to be adopted directly from the Clayton Act provision. The BHCA states as follows:

> *Any person who is injured in his business or property by reason of anything forbidden in § 1972 of this title may sue therefore in any district court of the United States* in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

(emphasis added)

The jurisdictional grant under the Sherman Act provides:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of § 8 of this title . . . .

15 U.S.C. § 9.

Congress has expressed, or at least unmistakably implied, an intent that jurisdiction over federal antitrust issues continue in federal courts as this Court has held for the past seventy-five years under the Sherman and Clayton Acts. Against the backdrop of prior antitrust law, it must be concluded that importing the jurisdictional language from the Clayton Act into the BHCA had identical jurisdictional implications.

Such an interpretation of 12 U.S.C. § 1972 not only makes rational sense, but is also consistent with the testimony at the Congressional hearings. In the course of those hearings, there were several references to enforcing the anti-tying provision in *federal courts.*[13]

While in the context of wholly new legislation, granting permission to sue "in any district court of the United States" does not necessarily mean *only* in the U.S. District Court, § 1972 was not enacted in a vacuum. Given § 1972's unmistakable character as antitrust legislation (the First Circuit referred to it as a "blunter version of § 3 of the Clayton Act," *Diversified Foods, Inc. v. First National Bank of Boston*, 985 F.2d 27, 29), and given the clear judicial holdings -- long pre-dating the 1970 BHCA amendments -- that jurisdiction over federal antitrust claims is exclusively within the federal courts, the implication ineluctably

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[13]*See* 2 Hearings before the Senate Committee of Banking and Currency at 966 (May 25-28, 1979) (statement of Senator Bennett, sponsor of the bill) ("I for one would be reluctant to take it [a provision for administrative enforcement] out completely and [would] leave the problem [of tie-ins] *entirely* to the process of suit through the *Federal courts and the Department of Justice.*" . . . (emphasis added). *See also Id.* at 965 (statement by Senator John Sparkman, Chairman of the Committee) (if a problem could not be resolved preliminarily through the supervisory agency and legal action were necessary it would be better "to go to court, go right into the *district court* where the bank is located." (emphasis added)).

arises that Congress intended no such radical departure as the lower courts have suggested.[14] As the First Circuit concedes in

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[14] The Circuit Court cases relied upon by Respondents are either distinguishable or simply contain no reasoning. The principal decision, *Lane v. Central Bank of Alabama N.A.*, 756 F.2d 814 (11th Cir. 1985), did not involve antitrust issues, but rather a kickback scheme between a borrower and a loan officer of the Central Bank. Clearly, such renegade conduct by a bank employee working in conjunction with a borrower was not the nature of the tie-in between the bank and its customer contemplated by the BHCA, and the case should have been dismissed for failure to state a claim upon which relief can be granted. Instead, in issuing an unnecessary jurisdictional ruling, the Eleventh Circuit engaged in a tortured analysis and ignored legislative history, this Court's precedent and basic principles of statutory construction. It concluded that the BHCA is not an "antitrust" law, because 12 U.S.C. § 1972 was not cited under the 1914 statutory definition of "antitrust" laws found in 15 U.S.C. § 12. Of course the provisions of 15 U.S.C. § 12 are not the cornerstone for the finding of exclusive federal court jurisdiction over antitrust matters. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 655 (1985) (emphasizing incompatibility and strong federal interest rather than definitions). In fact, there is not even a reference to 15 U.S.C. § 12 in any of this Court's decisions finding exclusive jurisdiction. In any event, one would not expect to find § 1972 listed in 15 U.S.C. § 12 since the latter was enacted in 1914, sixty years before the enactment of § 1972! The Eleventh Circuit, moreover, disregarded the pertinent legislative history demonstrating that § 1972 is antitrust legislation, ignored the extensive relationship between the Clayton Act and § 1972, ignored familiar principles of statutory construction, and disregarded jurisdictional grant language which is identical to the language in the Clayton Act.

The Fifth Circuit in *Cuervo Resources, Inc. v. Claydesta National Bank*, 876 F.2d 436 (5th Cir. 1989) simply accepted the

its decision below, there was no suggestion anywhere in the statutes or the legislative history that Congress intended state courts to have concurrent jurisdiction. *See Diversified Foods, Inc. v. First National Bank of Boston*, 985 F.2d at 29.

The First Circuit based its decision on a view that state courts are competent to handle antitrust cases and that prior rulings under the Sherman and Clayton Acts are the product of outdated reasoning. This reflects a misunderstanding of the "compatibility" factor and a misreading of this Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990).

This Court's decision in *Tafflin v. Levitt*, 493 U.S. 455, 459-67 (1990), did not question the decision finding exclusive jurisdiction over Sherman Act and Clayton Act cases. In fact the unanimous decision and the concurring opinion by Justices Scalia and Kennedy approvingly cite the decisions finding exclusive jurisdiction over Sherman and Clayton Act claims. *Id.* at 462, 471. They also make clear that it is not the competence of state ecourt judges that is the pertinent factor to consider -- but rather the desirability of uniform interpretations and the intent of Congress to have certain nationally important issues heard by a select group of judges who have developed an expertise and hospitality with the issues. *Id.* at 462-63.

Nor does this Court's rejection in *Tafflin* of an argument of exclusive federal court jurisdiction over RICO claims justify the First Circuit's decision. While the RICO statute used language in certain provisions similar to language in the Clayton Act, the RICO legislation, as reflected in its legislative history and the statute itself, obviously went far beyond antitrust legislation and had a far more wide-ranging and different purpose than the clear antitrust legislation enacted in the Bank Holding Companies Act. *Tafflin v. Levitt*, 493 U.S. at 461-467. The latter provisions were

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holding in the *Lane* case without any analysis whatsoever.

not wholly new causes of action, but rather modifications of existing causes of action which have been exclusively handled by federal courts for 120 years.

Title 12, section 1972 must be construed against the backdrop of prior general antitrust law. When the BHCA's purposes are taken into consideration, in conjunction with the fact that Congress merely revised prior antitrust law, and used the same jurisdictional grant language as in prior antitrust law, and the fact that congressional hearings strongly suggest enforcement only through utilization of the federal courts, one is led inescapably to the conclusion that Congress intended the jurisdictional terms to have the same effect as they have had for over one hundred years in the field of federal antitrust law.

CONCLUSION

Since the First Circuit and other Circuits have disregarded this Court's long-standing precedent requiring that antitrust matters involving commerce between the states be within the exclusive province of the federal courts, this Court should review the judgment below in order to assure that the principles of uniform application of the antitrust laws are observed.

Respectfully submitted,

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Dated: May 4, 1993

APPENDIX A

DIVERSIFIED FOODS, INC., et al.,
Plaintiffs-Appellants,

v.

The FIRST NATIONAL BANK OF BOSTON, et al.,
Defendants-Appellees.

No. 92-1164.

United States Court of Appeals,
First Circuit.

Heard July 29, 1992.

Decided Feb. 8, 1993.

Before TORRUELLA and BOUDIN, Circuit Judges, and KEETON, District Judge (District of Massachusetts, by designation)

BOUDIN, Circuit Judge.

In this case the district court dismissed a suit brought under the Bank Holding Company Act, 12 U.S.C. § 1972, on the ground that it was barred by *res judicata*. The prior litigation, held to bar the new federal action, was a state-court suit brought by the same plaintiffs against the same defendants and decided in favor of the latter. The disappointed plaintiffs now appeal, urging on several grounds that *res judicata* does not properly apply. In full agreement with the district court, we affirm its decision.

The procedural history of the two cases is complex and intertwined but a brief summary will suffice at the outset. Diversified Foods, Inc., and its operating subsidiary New England

Sales, Inc. (collectively, "the borrowers"), were engaged in a specialized form of wholesale distribution of goods. In financing their activities, they entered into various borrowing arrangements with First National Bank of Boston and its Maine subsidiary Casco Northern Bank (collectively, "the banks"). The arrangements, at least in the borrowers' view, contained terms restricting their ability to obtain alternative sources of financing.

During 1988, the borrowers first sought to expand their business and then suffered large losses. They attribute this reversal of fortune to the failure of the banks to provide adequate credit under the borrowing arrangements. Claiming multimillion dollar damages, the borrowers on August 21, 1989, brought suit against the banks in Maine Superior Court, asserting various state-law tort and contract claims. The complaint, as later amended in 1990, included the charge that the banks violated an implied covenant of good faith by imposing "unreasonable restrictions so as to prevent the [borrowers] from obtaining alternative financing." Discovery in the state case proceeded during 1989 and 1990.

On September 14, 1990, while the state case was proceeding, the borrowers brought the present action against the banks based on the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972(1). The new federal claims were based, it appears, on information obtained through discovery in the state case. The borrowers say that the new claims were asserted in a separate action in a different court because at that time the borrowers held the view (contrary to two circuit decisions) that federal courts have exclusive jurisdiction over claims under section 1972.[1]

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[1]Two weeks before filing the federal complaint, the borrowers moved to amend their state complaint to charge that the banks had breached their duty of good faith by "unreasonable, illegal, and anticompetitive" restrictions on alternative financing. Shortly after the federal complaint was filed, the banks opposed the state amendment. When the borrowers responded that the federal claims

When the banks answered the federal complaint on October 24, 1990, they included as a defense the assertion that the borrowers "have improperly split their causes of action, having previously filed in another court another complaint arising out of the same transaction or series of transactions." Thereafter, the banks resisted the borrowers' efforts in January 1991 to introduce the state claims into the federal action by amendment of the federal complaint or to delay the state proceedings. The banks did agree to have discovery in either case treated as if taken in both.

On April 18, 1991, the Maine Superior Court granted summary judgment in favor of the banks, a decision later affirmed on appeal. *Diversified Foods, Inc. v. First Nat'l Bank*, 605 A.2d 609 (Me. 1992). The banks then moved for summary judgment in the federal action on grounds of *res judicata*, and the district court granted the motion on January 9, 1992. 785 F. Supp. 8. A belated attempt by the borrowers to reopen the state case to add the federal claims was rejected by the state court, and this action was also affirmed on appeal. *Id.* The borrowers then pursued this appeal in the federal case.

[1] In this court the borrowers first argue that federal courts have exclusive jurisdiction over claims under the Bank Holding Company Act's anti-tying provisions. Therefore, they argue, *res judicata* cannot properly derive from the state court judgment because they could not have included the federal claims in their state case. We need not decide whether the conclusion would follow if the premise were sound, for the premise is mistaken. We follow two circuits and several other courts that uniformly hold that state tribunals have concurrent jurisdiction over section 1972 claims. *Cuervo Resources, Inc. v Claydesta Nat'l Bank*, 876 F.2d 436 (5th

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were not being asserted in the state case, the state court allowed the amendment, striking the words "illegal" and "anticompetitive."

Cir. 1989); *Lane v. Central Bank, N.A.*, 756 F.2d 814 (11th Cir. 1985).[2]

[2] The Bank Holding Company Act provides that anyone injured by a violation of section 1972 may sue "in any district court of the United States," admittedly making no reference to state courts. 12 U.S.C. § 1975. But it is now settled that there is a presumption in favor of concurrent jurisdiction, so that state courts may entertain federal civil claims as a matter of course "absent provision by Congress to the contrary or disabling incompatibility" between the federal claim and state court jurisdiction. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78, 101 S.Ct. 2870, 2874-75, 69 L.Ed.2d 784 (1981). Here there is no explicit bar to state-court jurisdiction and the subject matter is hardly beyond the competence of the state courts, which routinely consider claims under their own antitrust laws.

Of course, the resemblance to antitrust law cuts both ways, providing the borrowers' best argument for exclusive federal jurisdiction. Section 1972 is a blunter version of section 3 of the Clayton Act, 15 U.S.C. § 14, and with qualifications courts use Clayton Act precedents in applying section 1972. *E.g., Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 58-59 (5th Cir. 1978). In empowering federal courts to hear Clayton Act cases, Congress made no reference to state-court jurisdiction, *see* 15 U.S.C. § 15, and it is well settled (by judicial construction) that federal antitrust claims may be asserted only in federal court. *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, 252 U.S. 436, 440, 40 S.Ct. 385, 386, 64 L.Ed 649 (1920). The borrowers urge that the same gloss be applied to the Bank Holding Company Act.

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[2]Several state courts have reached the same conclusion. *See United Central Bank, N.A. v. Kruse*, 439 N.W.2d 849 (Iowa 1989); *Waite v. Banctexas-Houston, N.A.*, 792 S.W.2d 538 (Tex. Ct. App. 1990).

Exclusive federal-court jurisdiction over antitrust claims, although a firmly rooted rule, is the product of reasoning that the Supreme Court no longer applies in new matters. Like baseball's judicial "exemption" from the antitrust laws, *see Flood v. Kuhn*, 407 U.S. 258, 283-84, 92 S.Ct. 2099, 2112-13, 32 L.Ed.2d 728 (1972), the result persists but is not extended. This is the clear message of *Tafflin v. Levitt*, 493 U.S. 455, 459-60, 110 S.Ct. 792, 795-96, 107 L.Ed.2d 887 (1990), where the Supreme Court affirmed the state courts' concurrent jurisdiction over civil RICO claims and rejected the same Clayton Act analogy offered here. Indeed, the RICO statute uses jurisdictional language quite similar to the Bank Holding Company Act, *compare* 18 U.S.C. § 1964(c) *with* 12 U.S.C. § 1975, and was passed by the same Congress in the same session. *Tafflin* offers the *coup de grace* to the borrowers' argument for exclusive jurisdiction.[3]

[4] In *Currier v. Cyr*, 570 A.2d 1205 (Me. 1990), the Maine Supreme Judicial Court summarized the rule it follows in deciding whether new claims are barred because they were or "might have been" litigated in the prior case:

> Maine has accepted what is known as a "transactional test" of cause of action, which defines "the measure of a cause of action as the aggregate of connected operative facts that can be handled together conveniently for purposes of trial."

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[3]We give little weight to occasional references by Congress, in the legislative history of section 1972, to suits in "federal" courts. *See, e.g.*, 2 *One-Bank Holding Company Legislation of 1970: Hearings Before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 966 (1970) (statement of Sen. Bennett) (referring to "the process of suit through the Federal courts. . ."). These references, if any intent is attributable to them, appear to reflect the natural assumption that Bank Holding Company Act claims would usually be litigated in federal forums.

Id. at 1208 (quoting *Gurski v. Culpovich*, 540 A.2d 764, 766 (Me. 1988)). Accordingly, so long as the parties are the same in both cases and a final judgment was entered in the prior action, "a subsequent suit that arises out of *the same operative facts* shall be barred even though the second suit relies upon a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves [different] evidence. ..." *Id.* (emphasis added).

[5] In the present case the borrowers' federal claims under section 1972 unquestionably arise out of "the same operative facts" as the state claims earlier asserted by the borrowers. They themselves, in an unsuccessful attempt to add the state claims to the federal case based on pendent jurisdiction, told the district court that "[t]he facts forming the basis for the state claims are the same facts which form the basis of the pending [federal] action. ..." A comparison of the two complaints shows that the factual allegations substantially overlap. Further, the central tying allegation in the federal complaint -- that the banks restricted the borrowers' access to alternative sources of credit -- was one of the express claims in the state action.

[6] In this court, the borrowers make only a half-hearted effort to distinguish the two complaints under the Maine transactions tests for *res judicata*, and we think the point needs no further discussion. The borrowers' central arguments in resisting *res judicata*, exclusive jurisdiction aside, are variants on a single theme. They argue in substance that the banks themselves strove to keep the two actions separate, resisted the assertion of state claims in the federal case and vice versa, and now use the judgment in the suit first decided to prevent litigation of the other on the merits. This effort to resist consolidation, say the borrowers, should estop the banks from invoking *res judicata* or should be treated as a waiver of the defense.

We accept *arguendo* the borrowers' version of events, although it is unclear whether the banks followed a conscious

strategy or merely opposed seriatim the successive demands of an opponent. But in either event we do not see how the gravamen of the charge -- the banks' resistance to consolidation of the federal and state claims -- gives rise to an estoppel of the banks. The banks are not alleged to have said anything untrue. Their position throughout has been consistent. There is not even a valid charge of concealment or surprise: the banks' answer in the federal case gave fair warning of the risk of *res judicata* by asserting a claim splitting defense, expressly referring to the borrowers' state suit "arising out of the same transaction or series of transactions."

[7] As for waiver, it may be assumed that Maine, consistent with general law on the subject, would disallow *res judicata* if the "parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." *Calderon Rosado v. General Electric Circuit Breakers, Inc.*, 805 F.2d 1085, 1087 (1st Cir. 1986) (quoting *Restatement (Second) of Judgments* § 26(1)(a)).[4] Indeed, in *Thompson v. Gaudette*, 148 Me. 288, 92 A.2d 342 (1952), the Maine Supreme Judicial Court said that the rule against splitting a cause of action will be waived unless the defendant asserts it "at the earliest opportunity." 92 A.2d at 348 (quoting *Mayfield v. Kovac*, 41 Ohio App. 310, 181 N.E. 28, 30 (1931)). In our case, the banks at the outset pleaded claim-splitting in their answer and maintained that position throughout the case.

Courts could, we suppose, disallow the claim preclusion defense wherever two suits are brought and the defendant thereafter resists their consolidation. But when a plaintiff has chosen to bring two lawsuits in the same time frame relating to the same operative

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[4]In *Calderon Rosado* this court rejected on waiver grounds a *res judicata* defense in a federal action. The defendant had earlier agreed to the plaintiff's voluntary dismissal "with prejudice" of a wrongful discharge claim under Puerto Rican law brought in a local court, "seemingly acceding to plaintiff's desire to litigate in federal court" under a federal statute. 805 F.2d at 1086.

facts, it is hard to see why the defendant should not be able to resist consolidation on proper grounds, such as undue delay. If the resistance is unjustified, the plaintiff may normally litigate that issue within the lawsuit. In fact, the borrowers here did seek to add the federal claims to the state action; but they did so only *after* summary judgment was granted on the state claims. Not surprisingly, the Maine Supreme Judicial Court said that this effort came too late. *Diversified Foods, Inc.*, 605 A.2d at 616.[5]

[8,9] Finally, the borrowers suggest that, estoppel and waiver issues to one side, it would be inequitable to permit the *res judicata* defense. They argue that their decision to bring a separate federal suit, instead of adding the federal claims to the state case, was based on a good faith belief that exclusive federal-court jurisdiction prevented that course. *Res judicata* is a judge-made doctrine resting on considerations of policy, and doubtless there is room for equitable adjustments. *See generally* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4415 (1981). But in this case the mistaken belief in exclusive federal jurisdiction was formed in the face of two circuit decisions to the contrary.

Thus, the case for an equitable departure from *res judicata* is very weak. True, the banks played an aggressive hand, but litigation is inherently aggressive. Further, the borrowers created their own dilemma by bringing the two actions separately, ignoring the concurrent-jurisdiction precedents directly in point. Then, in the teeth of the warning furnished by the banks' claim splitting defense, the borrowers failed to assert the federal claims in the state case

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[5]The borrowers were only slightly more diligent in seeking to add the state claims to the federal case. In late January 1991, they moved to amend the federal complaint to assert the state claims and to stay the state action. This occurred, however, after the close of state discovery and on the eve of the banks' deadline for filing summary judgment motions.

until after that case had been lost. Like the Maine Supreme Judicial Court, we see no equitable basis for resurrecting claims that the borrowers themselves allowed to expire.

Affirmed.

APPENDIX B

DIVERSIFIED FOODS, INC., et al.,
Plaintiffs,

v.

THE FIRST NATIONAL BANK OF BOSTON, et al.,
Defendants.

Civ. No. 90-0221-P-H.

United States District Court,
District of Maine.

January 9, 1992.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

HORNBY, District Judge.

On August 21, 1989, Diversified Foods, Inc. and other plaintiffs ("DFI") filed a ten-count complaint in a state court (Cumberland County Superior Court), asserting against the First National Bank of Boston and other defendants ("FNB") state law breach of contract and tort claims in connection with two loan agreements dated October 21, 1987 ("Agreements"). Two days later FNB filed a state court action against DFI seeking to collect on the Agreements. The state court consolidated the two suits on December 15, 1989. On September 14, 1990, while the state action was pending, DFI filed a separate suit in this Court alleging that FNB's conduct in connection with the Agreements violated certain anti-tying provisions of the Bank Holding Act ("BHCA"), 12 U.S.C.

§ 1972. DFI never raised the BHCA claims in the state court case. FNB responded to the federal complaint by raising improper claim splitting as an affirmative defense. On April 18, 1991, the state court granted summary judgment in favor of FNB on all claims and counterclaims pending in the state court.

FNB has now moved for summary judgment here, arguing that the state court's judgment bars DFI's claims pending in this Court. Because I find, as a matter of law, that DFI is precluded under the doctrine of res judicata from raising the BHCA claims in this Court, FNB's motion is GRANTED.

[1,2] Both parties acknowledge this Court's obligation to give the state court judgment preclusive effect pursuant to 28 U.S.C. § 1738 and, in doing so, I follow the rules of preclusion determined under Maine law. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82, 102 S.Ct. 1883, 1897-98, 72 L.Ed.2d 262 (1982). In Maine, the doctrine of res judicata bars the relitigation of a cause of action that has already been resolved by a valid prior judgment. *Kradoska v. Kipp*, 397 A.2d 562, 565 (Me. 1979); *Barter v. Boothbay/Boothbay Harbor Community School Dist.*, 564 A.2d 766, 768 (Me. 1989). The bar extends to all issues "tried or that might have been tried" in the prior action. *Bray v. Spencer*, 146 Me. 416, 82 A.2d 794, 795 (1951), so long as three requirements are satisfied: (1) the same parties are involved; (2) a valid final judgment has been rendered in the prior action; and (3) the matters presented for decision in the second action were or might have been litigated in the prior action. *Kradoska v. Kipp*, 397 A.2d at 565.

The first two requirements are clearly satisfied here. All parties in this lawsuit were also parties in the state court proceedings.[1] Although DFI has appealed the state court judgment,

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[1]However, Ronald C. Giguere, President, Director and principal stockholder of Diversified Foods, Inc. was a plaintiff in the state

there can be no question that it is a valid final judgment for purposes of res judicata despite the pendency of appeal. *See Bartlett v. Pullen,* 586 A.2d 1263, 1265 (Me. 1991); *Restatement (Second) of Judgments* § 13, comment (f) (1982). The difficulty, if any, lies with the third requirement: specifically, whether the BHCA claims might have been tried in the state court action. DFI insists that jurisdiction under the BHCA is exclusively federal and, therefore, that it could not bring its BHCA claims in state court.

[3] It is well-settled that state courts presumptively enjoy concurrent jurisdiction with federal courts over federal claims unless Congress has divested the states of jurisdiction through "explicit statutory directive" or by "unmistakable implication from legislative history," or because there exists a "clear incompatibility between state-court jurisdiction and federal interests." *See Gulf Offshore Oil Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 887 (1990). DFI does not suggest that there is any "explicit statutory directive"[2] mandating exclusive federal jurisdiction or that any "clear incompatibility" of federal and state interests exists. DFI argues only that the BHCA's legislative history provides proof that jurisdiction under the Act is exclusively federal. According to DFI, Congress intended BHCA to complement the Clayton Act and Sherman Act antitrust legislation. Jurisdiction under these Acts has been held to be exclusively federal. *See Tafflin*

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court proceedings but is not a party in this suit. Further, five corporations affiliated with DFI were defendants in FNB's state court collection claims but are not parties to this action.

[2]The provision granting jurisdiction under the BHCA is 12 U.S.C. § 1975. It states: "Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States. ..." Use of the permissive term "may" here is consistent with the presumption of concurrent state court jurisdiction. *See, e.g., Tafflin v. Levitt,* 493 U.S. at 460-61, 110 S.Ct. at 795-96.

v. Levitt, 493 U.S. at 462, 110 S.Ct. at 797 (*citing General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 286-88, 43 S.Ct 106, 116-17, 67 L.Ed. 244 (1922)). DFI maintains that because Congress was aware of these judicial interpretations and because Congress incorporated a jurisdictional grant in the BHCA virtually identical to that in the Clayton Act,[3] Congress implicitly granted federal courts exclusive jurisdiction over BHCA claims.

[4] The inquiry, however, is whether the legislative record *positively* shows a congressional intent to divest state courts of concurrent jurisdiction. In rejecting a similar argument that jurisdiction under RICO legislation is exclusively federal, the Supreme Court said:

> To rebut the presumption of concurrent jurisdiction, the question is not whether any intent may be divined from legislative silence ..., but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal. ... [W]here the issue is whether jurisdiction is exclusive or concurrent, we are not free to add content to a statute via analogies to other statutes unless the legislature has specifically endorsed such action.

Tafflin v. Levitt, 493 U.S. 455, 462-63, 110 S.Ct. 792, 797, 107 L.Ed.2d 887 (1990). The legislative history here is utterly silent on the question of jurisdiction. Even if Congress considered the BHCA to be "antitrust" law, that fact by no means provides an "unmistakable implication" that Congress intended to confine jurisdiction to the federal courts. I therefore conclude that

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[3]The jurisdictional grant under the Clayton Act, 15 U.S.C. § 15, provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. ..."

jurisdiction under the BHCA is concurrent and that DFI had the opportunity to bring the BHCA claims before the state court. *Accord, Lane v. Central Bank of Alabama, N.A.*, 756 F.2d 814, 817-18 (11th Cir. 1985) ("our review of the legislative history [of the BHCA] reveals no 'unmistakable implication' that Congress intended to confine jurisdiction to the federal courts."); *Cuervo Resources, Inc. v. Claydesta Nat'l Bank*, 876 F.2d 436 (5th Cir. 1989).

I further conclude that the state and federal suits involve the same cause of action. Both the BHCA claims and the state breach of contract and tort claims arise out of the same transaction and involve the same operative facts: namely, the Agreements and the parties' conduct surrounding the making and implementing of the Agreements.[4] The cause of action being the same, it was incumbent on DFI, under principles of res judicata, to raise its

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[4]DFI essentially concedes this point in its January 31, 1991 Motion to Amend the Complaint to add the state claims. In support of this motion DFI said: "The facts forming the basis for the state claims are the same facts which form the basis of the pending action relating to the Banks' having violated the [BHCA]." Plaintiffs' Memorandum of Law Supporting Motion to Amend at 2.

BHCA claims in the state court proceedings.[5] *See Kradoska v. Kipp*, 397 A.2d at 568.

Accordingly, FNB's motion for summary judgment is *GRANTED*.

SO ORDERED.

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[5]DFI's assertions to the contrary, I find nothing in the record demonstrating that FNB tacitly acquiesced to having the BHCA claims litigated in this forum. FNB objected to DFI's proposed amendment to the state court complaint which referred to "illegal" and "anti-competitive" conduct on the grounds that such an amendment was untimely and unduly burdensome, not because it agreed that those issues were properly before the federal court. FNB specifically put DFI on notice that it would object by raising claim splitting as an affirmative defense to the BHCA claims. Despite this fact, DFI did not attempt to interject the BHCA claims into the state case until after the state court had granted summary judgment in favor of FNB.

APPENDIX C

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
CV-89-1073
CV-89-1082

DIVERSIFIED FOODS et al.,

Plaintiffs,

v.

THE FIRST NATIONAL BANK
OF BOSTON and CASCO
NORTHERN BANK, N.A.,

Defendants.

MOTION HEARING

BEFORE: HONORABLE KERMIT V. LIPEZ,
JUSTICE OF THE SUPERIOR COURT

Cumberland County Courthouse
Portland, Maine

September 28, 1990
1:30 p.m.

[22] THE COURT: All right, my position is as follows, I am going to grant the motion to amend, I will delete only the words illegal and anticompetitive. I do that with the clear understanding by

the representations made by Mr. Poulos that any allegations of illegality under the federal act are no part of this trial.

I do recognize that the presence of the **[23]** words unreasonable may raise questions about the commercial reasonableness of this type of provision which may require expert testimony, there are still two months left in the discovery period, I recognize that the need for such expert testimony if there is a need will increase the costs, perhaps for both parties in this case, but I do not believe that the extra cost constitutes undue prejudice. I do not feel that there has been any bad faith in the filing of this amendment, the timing was consistent with the deadlines set forth in the pretrial order.

Mr. Poulos has indicated, and I have no reason to question this, that over the history of the case as it has evolved so far they began to focus on these provisions and not only they're unreasonable but also they're possible illegality, the illegality has become part of the federal action. I see again no bad faith or desire for a delay, in fact to the contrary, the plaintiffs have been eager to get this matter to trial. In short, I don't see that I can make the findings that would be necessary to preclude this amendment as amended and therefore I will **[24]** grant the motion to amend.

I also will say right now that I see no reason given this amendment and the time that is still available for discovery to delay the trial, I see no reason therefore to depart from the January trial that we were talking about, I will do all that I can to try to get the matter tried here in Cumberland County, however, for all the reasons we have discussed previously I simply don't know if it's possible, I will try as best I can to have that done, but if I can't it will have to be done in Sagadahoc County.

Supreme Court, U.S.
FILED
MAY 27 1993
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No. 92-1801

In The

Supreme Court of the United States

October Term, 1992

DIVERSIFIED FOODS, INC., and
NEW ENGLAND SALES, INC.,

Petitioners,

v.

THE FIRST NATIONAL BANK OF BOSTON, N.A.
and CASCO NORTHERN BANK, N.A.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Because the only question presented by the Petitioners for review is whether the federal court has exclusive jurisdiction over claims asserted under the Bank Holding Company Act, 12 U.S.C. §§ 1972 *et seq.* ("BHCA"), the only facts relevant to the petition are the following: (1) Petitioners asserted various state law claims in an action they pursued in the Maine state court; (2) while that state action was pending, Petitioners asserted a BHCA claim, based on the same facts, in federal court; (3) Respondents asserted claim-splitting as an affirmative defense to the federal action; (4) the state court granted summary judgment to Respondents on the merits in the state action; and (5) the federal court then granted summary judgment to Respondents based on principles of *res judicata*.

While Petitioners have included statements in their Statement of the Case that are not correct (*e.g.*, "Respondents acquiesced in permitting the claims to be pursued separately"), these statements are not material to the question presented by Petitioners for review. Therefore, Respondents will not detail these inaccuracies, beyond pointing to the recitation of the facts contained in the decisions of the District Court and First Circuit.

ARGUMENT

Since 1972, when Congress enacted the BHCA, only a handful of state and federal courts have been confronted with the argument that the Act bestows exclusive jurisdiction upon the federal courts. Consistent with this

Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990), which construed virtually identical statutory jurisdictional language contained in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c), and consistent with this Court's explanation in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) of the factors to be examined in determining whether the exception of exclusive jurisdiction has been bestowed in federal legislation, *all* of the lower courts which have decided this issue in published decisions have found BHCA jurisdiction to be concurrent. *Cuervo Resources, Inc. v. Claydesta National Bank*, 876 F.2d 436 (5th Cir. 1989); *Lane v. Central Bank of Alabama, N.A.*, 756 F.2d 814 (11th Cir. 1985); *United Central Bank of Des Moines, N.A. v. Kruse*, 439 N.W.2d 849 (Iowa 1989); *Waite v. Banctexas-Houston, N.A.*, 792 S.W.2d 538 (Tex. Ct. App. 1990). *See also Central Texas Hardware, Inc. v. First City, Texas-Bryan, N.A.*, 810 S.W.2d 234, 237-38 (Tex. Ct. App. 1991) (implicitly finding jurisdiction concurrent by ruling on a BHCA claim). *No* court has held to the contrary.

Hence, the decision of the First Circuit in the instant case is consistent with the decisions of other federal and state courts. See Rule 10(1)(a) of the Rules of the Supreme Court. Additionally, the First Circuit's decision does not conflict with any applicable decision of this Court. *Id.*, Rule 10(1)(c).

Finally, the issue presented by Petitioners here relates to the construction of one specific statute. Given the principles outlined by this Court previously in *Gulf Offshore* and *Tafflin*, the examination of whether jurisdiction is exclusive or concurrent is statute-specific; therefore, the resolution of this issue as to the BHCA would not

resolve any other, broader question relating to other statutes. The jurisdictional question as to the BHCA has, as indicated above, only arisen infrequently in the twenty years the law has been in existence. Hence, the question presented by Petitioners is neither "special" nor "important," as those terms are used in Rule 10.1 of the Rules of the Supreme Court. *See Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955) ("special and important" means beyond "the academic or episodic").

Not only does the question presented by Petitioners fail the test for grant of certiorari set forth in Rule 10, but the specific arguments upon which Petitioners base their claim of exclusive jurisdiction have been previously rejected by this Court.

Petitioners focus on two arguments: the "antitrust" type language of the BHCA and the legislative history of the Act. This Court previously rejected a similar antitrust analogy argument in *Tafflin*,[1] and the legislative history upon which Petitioners' argument is based (two Senators' references to "district" or "federal" court), has also been found insufficient to reflect a bestowal of exclusive jurisdiction in parallel situations. *See Gulf Offshore*, 453 U.S. at 479-83 (such a reference, even by a majority of senators in the form of the language of the statute, does not divest

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[1] The RICO statute construed by the Court in *Tafflin* was enacted in the same session of the same Congress as the BHCA. (RICO was passed on October 15, 1970, Pub.L. 91-452, 84 Stat. 841; the BHCA was passed on December 31, 1970, Pub.L. 91-60, 84 Stat. 1766.) The jurisdictional language of the RICO statute examined in *Tafflin* is practically identical to the parallel language in the BHCA. Compare the BHCA, 12 U.S.C.A. § 1975, with RICO, 18 U.S.C. § 1964(c).

state courts of jurisdiction); *Dowd Box Co. v. Courtney*, 368 U.S. 502, 512-13 (1962) (Senator's reference to giving employers the right to sue in federal court did not indicate exclusive jursdiction under Section 301(a) of LMRA, 29 U.S.C. § 485(a)).[2]

CONCLUSION

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinions of both Courts below, the Petition should be denied.

Respectfully submitted,

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[2] The Eleventh Circuit reviewed the legislative history of the BHCA and concluded that it revealed "no 'unmistakable implication' that Congress intended to confine jurisdiction to the federal courts," *Lane*, 756 F.2d at 817-18, as required under the test for exclusive jurisdiction consistently announced and followed by this Court.